IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**CRIMINAL ACTION**
	:	**NO. 94-276**
v.	:	
	:	
NATHANIEL SWINT	:	
Defendant.	:	

DuBOIS, J. **FEBRUARY 27, 2007**

M E M O R A N D U M

I. INTRODUCTION

Presently before the Court is defendant Nathaniel Swint's *pro se* Motion for Reconsideration of This Court's February 5, 2007 Order Denying to Accept Jurisdiction and Acting Without Jurisdiction. For the reasons set forth below, defendant's Motion for Reconsideration is denied.

II. BACKGROUND

A detailed factual and procedural history is included in three previously reported opinions in this case. See United States v. Swint, 2005 WL 2811749, *1-2 (E.D. Pa. Oct. 25, 2005); United States v. Swint, 2000 WL 987861, *1 (E.D. Pa. July 17, 2000) (post-conviction procedural history); United States v. Swint, 1996 WL 383118, *1 (E.D. Pa. July 2, 1996) (factual history and analysis of *pro se* post-trial motions). Accordingly, this Memorandum sets forth only the factual and procedural history necessary to explain this Court's ruling.

This case arises out of the distribution of heroin and cocaine that defendant obtained from an FBI Special Agent who had stolen massive quantities of drugs from the FBI's evidence

control room.

Defendant was charged in a four count Indictment. Count One of the Indictment charged that from in or about January 1994, through in or about March 1994, defendant conspired to distribute cocaine, a schedule II controlled substance, and heroin, a schedule I controlled substance, in violation of 21 U.S.C. § 846. Count Two charged that between in or about January 1994, and in or about March 1994, defendant possessed, with intent to distribute, in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1). Count Three charged that between in or about January 1994, and in or about March 1994, defendant possessed, with intent to distribute, in excess of five hundred grams of cocaine, in violation of 21 U.S.C. § 841(a)(1). Count Four charged that from in or about April 1994, through in or about May 1994, defendant attempted to possess, with intent to distribute, in excess of one kilogram of heroin, in violation of 21 U.S.C. § 846.

On February 24, 1995, a jury convicted defendant of all four counts. Swint, 1996 WL 383118 at *1. This Court sentenced defendant on September 20, 1996. The Court calculated defendant's sentence under the November 1, 1995 edition of the United States Sentencing Guidelines ("Sentencing Guidelines"). See U.S. Sentencing Guidelines Manual § 1B1.11(a) (1995). Under §§ 3D1.2(b) and (d) of the Sentencing Guidelines, all four counts were grouped together for the purpose of calculating the Guideline sentence. The applicable Guideline for the underlying statute of conviction, § 841(a)(1), was § 2D1.1. See Id. at Appx. A.

This Court determined drug quantity based on the trial evidence, the Presentence Investigation Report dated May 10, 1995, and the Addendum to the Presentence Report dated September 12, 1996. Based on all such evidence, the Court determined that defendant was criminally responsible for one kilogram of heroin (Count Two), four kilograms of cocaine (Count

Three), and attempted possession of approximately three kilograms of heroin (Count Four). The Court also found that during the course of the conspiracy, defendant received two one ounce samples of heroin, which were included in the drug quantity under § 1B1.3 of the Sentencing Guidelines. Thus, the base offense level was computed using four kilograms of heroin, four kilograms of cocaine, and two ounces of heroin. See Presentence Report ¶ 32.

Because two different substances were involved–heroin and cocaine–the Court converted the substances into a common substance, marijuana, and determined that defendant was criminally responsible for the equivalent of 4,856.7 kilograms of marijuana. For that drug quantity, the base offense level (and the total offense level) was 34. Given defendant's Criminal History Category, Category IV, the Guideline Imprisonment Range was 210 to 262 months imprisonment for all counts. Swint, 2000 WL 987861 at *12 n.14.

Prior to sentencing, the government filed an Information under 21 U.S.C. § 851 setting forth two previous convictions for use in seeking increased punishment. As a result of the filing of the Information, and the drug quantity involved, the mandatory minimum sentence for Counts Two and Four was life imprisonment on each count. See 21 U.S.C. § 841(b)(1)(A).[1] Pursuant to § 5G1.1(b) of the Guidelines, the mandatory minimum sentence on those counts was deemed to be the Guideline sentence, and the Court imposed that sentence.

As a result of the filing of the Information, and the drug quantity involved, the mandatory

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[1] 21 U.S.C. § 841(b)(1)(A) provides, in relevant part:

> In the case of a violation of subsection (a) of this section involving–(I) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

minimum sentence on Counts One and Three was ten years. See 21 U.S.C. § 841(b)(1)(B).[2] Because the Guideline Imprisonment Range for Counts One and Three–210 to 262 months–exceeded the mandatory minimum sentence, the Court imposed concurrent sentences of 250 months on Counts One and Three. The sentence on Counts One and Three was ordered to run concurrently with the sentence on Counts Two and Four.

On August 8, 1997 the United States Court of Appeals for the Third Circuit affirmed defendant's conviction and sentence. United States v. Swint, No. 96-1870, slip op. (3d Cir. Aug. 8, 1997). Defendant then filed a petition for a writ of certiorari in the United States Supreme Court. Certiorari was denied on May 4, 1998, and defendant's conviction became final on that date. Swint, 2000 WL 987861 at *5.

In the instant Motion for Reconsideration, as in many prior motions, petitioner challenges the legality of his sentence. Specifically at issue in the Motion for Reconsideration are three Orders of this Court dated September 5, 2006; October 24, 2006; and February 5, 2007.

In the Order dated September 5, 2006, this Court, *inter alia*, dismissed without prejudice defendant's *pro se* Motion For Relief From the June 23, 2006 and July 28, 2006 Orders Pursuant Rule 60(b)(1) (Document No. 329), and denied defendant's *pro se* Motion to Take Judicial Notice (Document No. 330).

In the Order dated October 24, 2006, this Court denied defendant's *pro se* Supplemental

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[2] 21 U.S.C. § 841(b)(1)(B) provides, in relevant part:
In the case of a violation of subsection (a) of this section involving–(I) 100 grams or more of a mixture or substance containing a detectable amount of heroin;(ii) 500 grams or more of a mixture or substance containing a detectable amount of . . . cocaine . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment. . .

Motion to Take Judicial Notice of the Pending Motion to Take Judicial Notice (Document No. 333); denied defendant's *pro se* Motion to Make Additional Findings (Document No. 2 in C.A. No. 06-011); and denied defendant's *pro se* Motion to Take Judicial Notice (Document No. 3 in C.A. No. 06-011).

Defendant filed a notice of appeal as to the September 5, 2006 and October 24, 2006 Orders on November 2, 2006. The Court granted defendant's motion for permission to appeal *in forma pauperis* on January 16, 2007.

Thereafter, in the Order dated February 5, 2007, the Court, *inter alia*, denied defendant's *pro se* Motion for Modification of Term of Imprisonment (Document No. 345). The Court denied the Motion for Modification on three grounds: (1) that defendant was sentenced in accordance with Amendment 591 of the Sentencing Guidelines because the appropriate guideline, § 2D1.1, was utilized; (2) that Amendment 591 does not apply to mandatory minimum sentences such as were imposed in this case; and (3) that the Court lacked jurisdiction to review defendant's motion under 18 U.S.C. § 3582(c)(2) because defendant filed the Motion for Modification of Term of Imprisonment more than ten years after sentencing.

In addition, in the Order dated February 5, 2007, the Court amended the Order dated September 5, 2006 to correct a misstatement about the procedural history of this case. Defendant identified this misstatement in the Motion for Modification of Term of Imprisonment, which was the subject of the February 5, 2007 Order. See Mot. Modification of Term of Imprisonment, ¶¶ 12-13, Ex. 7. Specifically, the September 5, 2006 Order incorrectly stated that "defendant's sentence was not in any way affected by his guilty plea on January 22, 1974 to a state drug charge . . ." Although defendant's 1974 state drug conviction did not affect his Criminal History Category under the Sentencing Guidelines, the conviction did qualify as a "felony drug offense"

under the mandatory minimum statute, 21 U.S.C. § 841(b)(1)(A), and the mandatory minimum became the Guideline sentence. See Swint, 2000 WL 987861 at *12 n.14. The February 5, 2007 Order corrected this misstatement. In the February 5, 2007 Order, the Court also amended the Order dated October 24, 2006 to identify the September 5, 2006 Order as "the Order dated September 5, 2006 as amended by the Order dated February 5, 2007."

On February 14, 2007, defendant filed the instant Motion for Reconsideration. In the Motion for Reconsideration, defendant seeks reconsideration of two parts of the February 5, 2007 Order. First, defendant seeks reconsideration of that part of the Order in which the Court denied defendant's *pro se* Motion for Modification of Term of Imprisonment. Second, defendant seeks reconsideration of that part of the Order in which the Court amended the Orders dated September 5, 2006 and October 24, 2006. This memorandum addresses each issue in turn.

III. LEGAL STANDARD

Three situations justify granting a motion for reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence not available when the court dismissed the prior petition; or (3) the need to correct a clear error of law or fact or to prevent "manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999); Enigwe v. United States Dist. Ct. for the Eastern Dist. of Pa., 2006 WL 2884433, *1 (E.D. Pa. Oct. 6, 2006). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995); see also Porter v. NationsCredit Consumer Discount Co., 2006 WL 1737544, *2 (E.D. Pa. Jun. 22, 2006).

Because defendant filed the instant Motion for Reconsideration *pro se*, the Court will construe defendant's arguments liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

IV. DISCUSSION

A. Defendant's Sentencing Claims

Defendant seeks reconsideration of that part of the February 5, 2007 Order in which the Court denied defendant's *pro se* Motion for Modification of Term of Imprisonment. Defendant alleges that reconsideration is necessary to correct errors of law or fact and to prevent injustice. For the reasons that follow, the Court concludes that the arguments advanced in defendant's Motion are not a basis for reconsidering the Order dated February 5, 2007.

First, in the Motion for Reconsideration, defendant asserts that this Court has jurisdiction to modify his sentence under 18 U.S.C. § 3582. This assertion is little more than a restatement of arguments previously made in the Motion for Modification of Term of Imprisonment. "A motion for reconsideration is not properly grounded on a request that a court consider repetitive arguments that have been fully examined by the court." Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc., 246 F. Supp. 2d 394, 398 (E.D. Pa. 2002).

Second, in the Motion for Reconsideration, defendant elaborates on arguments made in the Motion for Modification of Term of Imprisonment. Specifically, defendant asserts that the Court engaged in improper judicial fact-finding as to drug quantity, and that the Court improperly sentenced defendant on the basis of drug quantity that was not found by the jury. According to defendant, this improper judicial fact-finding increased the statutory maximum sentence and resulted in both higher Guideline calculations[3] and mandatory minimum sentences under 21

[3] As to the Court's Guideline calculation, petitioner asserts: "Amendment 591 required Movant's standard applicable guideline to be under USSG § 2D1.1(c)(14). This, because Movant was convicted of a detectable amount of heroin/cocaine on all four counts according to the jury verdict of February 23, 1995." Mot. at 3-4.

U.S.C. §§ 841(b)(1)(A) and (B).[4]

On its face, the Motion for Reconsideration cites Amendment 591 of the Sentencing Guidelines as the authority for defendant's drug quantity arguments. However, Amendment 591 does not apply to drug quantity, or to mandatory minimum sentences such as were imposed in this case. Amendment 591 "reflects a change from the permissive to the mandatory. The sentencing court no longer uses the Statutory Index (Appendix A) [of the Sentencing Guidelines] as an aid in finding the most applicable guideline among several possibilities; the Statutory Index (Appendix A) now conclusively points the court to the one guideline applicable in a given case." United States v. Diaz, 245 F.3d 294, 301 (3d Cir. 2001).

In a liberal reading of the *pro se* Motion for Reconsideration, the Court concludes that defendant's sentencing argument invokes not Amendment 591, but Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In Apprendi, decided June 26, 2000, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi "applies where the District Court imposes a sentence in excess of the otherwise applicable statutory maximum on the basis of a fact not found by a jury beyond a reasonable doubt." United States v. Zimmerman, 80 Fed. Appx. 160, 164 (3d Cir. 2003).

In the Motion for Reconsideration, defendant asserts that "the jury's verdict was for a detectable amount of a controlled substance. That is, this Court was without jurisdiction to impose the mandatory minimum." Mot. at 4. In essence, defendant is arguing that, as a result of

[4] As to the mandatory minimum sentences, petitioner asserts: "Although Movant was sentenced under 21 U.S.C. § 841(b)(1)(A), the jury's verdict was for a detectable amount of a controlled substance. That is, this Court was without jurisdiction to impose the mandatory minimum." Id. at 4.

impermissible judicial fact-finding as to drug quantity, the statutory maximum sentence was increased to life imprisonment under the mandatory minimum statute, 21 U.S.C. § 841(b)(1)(A). As a result, both the Sentencing Guideline range and the mandatory minimum sentences were higher than they would have been without judicial fact-finding. The Court rejects defendant's claim.

To the extent that defendant invokes Apprendi in the Motion for Reconsideration, his claim is barred by Teague v. Lane, 489 U.S. 288 (1989). The Third Circuit has made it clear that, under Teague, Apprendi does not apply retroactively to cases on collateral review. United States v. Swinton, 333 F.3d 481, 491 (3d Cir. 2003); cf. Lloyd v. United States, 407 F.3d 608, 615-16 (3d Cir. 2005) (holding that United States v. Booker, 543 U.S. 220 (2005), does not apply retroactively to cases in which the judgment of conviction was final before January 12, 2005).

In this case, defendant was convicted on February 24, 1995. On August 8, 1997 the United States Court of Appeals for the Third Circuit affirmed defendant's conviction on all counts. Defendant then filed a petition for a writ of certiorari in the United States Supreme Court. Certiorari was denied on May 4, 1998, and defendant's conviction became final at that time. Swint, 2000 WL 987861 at *5. Because defendant's judgment of conviction became final over two years prior to the Apprendi decision, Apprendi does not apply to his case.[5] Thus, the

[5] This is not the first time that defendant has attempted to challenge this Court's determination of drug quantity. Defendant previously filed a motion pursuant to Federal Rule of Civil Procedure 60(b), arguing that he is "entitled to relitigate the drug quantities and recidivism as elements of 21 U.S.C. § 841 . . . to enforce the jury trial right to determine those issues under 28 U.S.C. § 2255 ¶ 6(3)." United States v. Swint, 2006 WL 1737236, *3 (E.D. Pa. Jun. 23, 2006). This Court construed defendant's Rule 60(b) motion as a second or successive habeas corpus petition under Gonzalez v. Crosby, 545 U.S. 524 (2005) and Pridgen v. Shannon, 380 F.3d 721 (3d Cir. 2004). Because defendant did not obtain an order from the Court of Appeals for the Third Circuit authorizing this Court to consider the 60(b) motion, the Court dismissed the motion without prejudice as an unauthorized habeas petition. See 28 U.S.C. § 2244(b) ("Before

Court concludes that defendant's sentencing arguments are not a basis for reconsidering the Order dated February 5, 2007.

B. Defendant's Jurisdictional Claim

In the Motion for Reconsideration, defendant also seeks reconsideration of that part of the February 5, 2007 Order in which the Court amended the wording of Orders dated September 5, 2006 and October 24, 2006. Defendant asserts that the Court lacked jurisdiction to amend the September 5, 2006 and October 24, 2006 Orders because he previously filed a notice of appeal as to those Orders.

Ordinarily "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance-it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). This "judge-made" rule is "founded on prudential considerations." Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988). Specifically, the Griggs rule was designed to address the "confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously." Venen v. Sweet, 758 F.2d 117, 120 n.2 (3d Cir. 1985); see also In re Merck & Co., 432 F.3d 261, 268 (3d Cir. 2005); Mary Ann Pensiero, Inc., 847 F.2d at 97.

However, the Griggs rule "should not be employed to defeat its purpose or to induce unnecessary paper shuffling." United States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980); see also

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a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

Mary Ann Pensiero, Inc., 847 F.2d at 98. Accordingly, a district court may maintain jurisdiction over a motion that is "'uniquely separable' and collateral from the decision on the merits." Mary Ann Pensiero, Inc., 847 F.2d at 98. In addition, the district courts retain jurisdiction "to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney's fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail." Sheet Metal Workers' International Assoc. Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999); see also United States v. McGregor, 866 F. Supp. 215, 216 n.3 (E.D. Pa. 1994) ("There are grey areas surrounding the issues of appealability, prematurity of appeals, and the situs of jurisdiction during the period when a party is attempting to clarify rulings by either or both the district court and the appellate court.") (quoting Bensalem Township v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1315 (3d Cir. 1994)).

In this case, on November 2, 2006, defendant filed a notice of appeal as to Orders dated September 5, 2006 and October 24, 2006. Thereafter, he filed a Motion for Modification of Term of Imprisonment, in which he challenged his sentence on the basis of Amendment 591 of the Sentencing Guidelines and 18 U.S.C. § 3582(c)(2).[6] In the Motion for Modification of Term of Imprisonment, defendant also identified a misstatement in this Court's September 5, 2006 Order. See Mot. Modification of Term of Imprisonment, ¶¶ 12-13, Ex. 7.

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[6] 18 U.S.C. § 3582(c)(2) provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

By Order dated February 5, 2007, the Court, *inter alia*, denied defendant's *pro se* Motion for Modification of Term of Imprisonment. Further, in the February 5, 2007 Order, the Court amended the wording of the Order dated September 5, 2006 to correct the misstatement identified by defendant. This amendment did not in any way alter the substance of the September 5, 2006 Order.[7] Rather, the amendment of the September 5, 2006 Order corrected the record as to the procedural history of this case.[8]

The Court deemed it appropriate to rule on the Motion for Modification of Term of Imprisonment in light of the nature of this case. Specifically, the Court concluded that the application of the Griggs rule would "induce unnecessary paper shuffling" given the fact that defendant is before the Court of Appeals for the Third Circuit on a regular basis. Leppo, 634 F.2d at 104. The Order dated February 5, 2007 "will not interfere with or overlap the circuit court's action" but rather will "aid the higher court in consideration of the appeal." Goodman v. Lukens Steel Co., 1987 WL 13444, *1 (E.D. Pa. Jun. 30, 1987). Thus, the Court concludes that the issuance of the February 5, 2007 Order was "both desirable and permissible, the appeal notwithstanding." Id.

The Court further concludes that this Court has jurisdiction to rule on defendant's Motion

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[7] The September 5, 2006 Order, *inter alia*, denied defendant's Motion to Take Judicial Notice on two grounds. After amendment, that Order denied the Motion to Take Judicial Notice on one ground. Specifically, the Court denied the Motion to Take Judicial Notice because this Court does not have jurisdiction to examine whether defendant's guilty plea to a state drug charge was voluntary, knowing, and intelligent "with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). A challenge to the guilty plea to the state drug charge must first be raised in state courts and the defendant has failed to do so.

[8] In the February 5, 2007 Order, the Court also amended the Order dated October 24, 2006 to identify the September 5, 2006 Order as "the Order dated September 5, 2006 as amended by the Order dated February 5, 2007."

for Reconsideration of the Order dated February 5, 2007. Under Federal Rule of Appellate Procedure 4(a) "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . to alter or amend the judgment under Rule 59." Fed. R. App. P. 4(a). "For purposes of [Rule] 4(a), this court regards a motion labeled only as a motion for reconsideration as the functional equivalent of a Rule 59 motion." Tiscornia v. Sysco Corp., 1997 WL 364279, *1 n.1 (E.D. Pa. Jun. 23, 1997). "Case law interpreting this rule acknowledges that the district court has the 'express authority to entertain a timely motion to alter or amend a judgment . . . even after a notice of appeal had been filed.'" Id. (quoting Griggs, 459 U.S. at 59); see also Nassau Sav. & Loan Ass'n v. Gulph Woods Corp., 1990 WL 79404, *1 n.3 (E.D. Pa. 1990). In this case, defendant filed the instant Motion for Reconsideration within the required ten-day time limit.[9] Thus, the Court retains jurisdiction to dispose of the instant Motion for Reconsideration and to resolve this matter "justly and efficiently." Id.

V. CONCLUSION

The arguments advanced in defendant's Motion are not a basis for reconsidering the Court's Order dated February 5, 2007. Accordingly, defendant's Motion for Reconsideration is denied.

An appropriate order follows.

[9] A timely motion for reconsideration is one that is filed within ten days after the entry of judgment. See Fed. R. Civ. P. 59(e). In this case, defendant's Motion for Reconsideration was docketed on February 14, 2007. Thus, defendant's Motion for Reconsideration was timely filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**CRIMINAL ACTION**
	:	**NO. 94-276**
v.	:	
	:	
NATHANIEL SWINT	:	
Defendant.	:	

O R D E R

AND NOW, this 27th day of February, 2007, upon consideration of the *pro se* Motion for Reconsideration of This Court's February 5, 2007 Order Denying to Accept Jurisdiction and Acting Without Jurisdiction (Document No. 349, filed February 14, 2007), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** thatthe *pro se* Motion for Reconsideration of This Court's February 5, 2007 Order Denying to Accept Jurisdiction and Acting Without Jurisdiction is **DENIED**.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DuBOIS, J.